STATE OF MICHIGAN

COURT OF APPEALS

ARENAC TOWNSHIP, RAY KULEK, JOHN DAVENPORT, THERON REYNOLDS, ROBERT DRINKWINE, TOM JUREK, JOSEPH ZDANOWSKI, DAN RATAJCZAK, ROBERT R. MORGAN, WILLIAM MORGAN, JAMES PAYEA, JOHN WILLIS, ROBERT LABEAN, JOEL BUTLER, RON BUECHE and DONALD BAKER,

Plaintiffs/Counter-Defendants-Appellees,

v

ARENAC COUNTY ROAD COMMISSION,

Defendant,

and

AUDREY LENTZ and JEFFREY A. HARTLEY,

Defendants/Counter-Plaintiffs-Appellants,

and

BLAKE HARTLEY,

Defendant-Appellant.

UNPUBLISHED
June 24, 2010

No. 289610
Arenac Circuit Court
LC No. 06-009911-CH

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's judgment in favor of plaintiffs that found that a public highway by user exists over defendants' land. We affirm.

I. Underlying Facts

This litigation involves the strip of land running from the south end of the improved portion of Hale Road in Arenac County south to Saginaw. Hale Road forms part of the border between Arenac Township and Au Gres Township. The southern end of the improved portion of Hale Road is marked by a turn-around circling a recently fallen oak tree. Although the level of Saginaw Bay fluctuates, the oak tree is currently approximately one mile north of the bay. An old agricultural drain begins, immediately south of the turn-around, which runs south to the bay. Plaintiffs' witnesses testified that they have used the drain for decades as a road for hunting and access to the bay for fishing. They testified to driving motor vehicles on the road to gain access to the bay

Defendant Jeffrey Hartley testified that he and his brother own about 80 acres of land, including a portion of the land in question. He testified that members of the public made use of the land for hunting and fishing, and that the use had become more frequent and more annoying in recent years, describing increased noise, altercations, and property damage. Defendant Lentz, who owns the other portion of the land in question, also testified that she became more and more irritated by the increased use of the drain, and the associated noise and property damage. Lentz testified that she went to the township board for a solution, but they did not help. She then contacted the Arenac County Road Commission, which informed her that the road ended where the drain began. Next, she contacted the Arenac County Drain Commissioner and the five drain commissioners in surrounding counties, all of whom told her that drain easements are private property. Thereafter, she contacted a representative of the state Department of Natural Resources to inquire about creating alternate access sites, but was told that the DNR "was not in a position to do that." Defendants posted signs announcing that the trail was closed, and physically blocked access to it.

Plaintiffs, including Arenac Township and several individuals, responded by suing to enjoin defendants from blocking the drain and for a declaration that Hale Road was a public highway extending to Saginaw Bay. Following a bench trial, during which the trial court viewed the property in person, the court found that a public highway by user exists over defendants' land, effectively extending Hale Road south to the bay.

II. Standard of Review

We review a trial court's determination of the legal requirements of establishing a highway by user de novo, but review the trial court's factual findings for clear error. *Villadsen v Mason Co Rd Comm*, 268 Mich App 287, 291-292; 706 NW2d 897 (2005).

III. Requirements of Defined Line of Travel and Government Maintenance

Defendants first claim that the trial court's factual findings were unsupported by the evidence and were clearly erroneous. We disagree.

Any road used as a highway for ten years or more may be deemed a public highway if it meets the other requirements of MCL 221.20. In addition to the ten-year requirement, three elements are needed to establish a highway by user: "(1) a defined line, (2) that the road was used and worked on by public authorities, . . . and [3] open, notorious, and exclusive public use."

Villadsen, 268 Mich App at 292. Defendants challenge the trial court's findings with respect to requirements (1) and (2).

The finding of a defined line of travel was based primarily on the trial court judge's personal visit to the location in question. In *Villadsen*, one of the issues on appeal was whether the trial court had erred in finding a defined line of travel. In that case, the Court stated:

> We defer to the trial court's superior ability to determine whether the roadway was defined inasmuch as the trial judge personally observed the disputed portion of the roadway. . . . As trier of the facts, a trial judge has wide discretion in his determination of the facts. It is particularly inappropriate for this Court to substitute its judgment on a finding such as this when the trial judge personally observed the disputed section of the roadway in question. [268 Mich App at 294 (citation and quotation marks omitted).]

In addition to the trial court judge's visit to the scene, testimony at trial supported a finding of a defined line of travel. Defendants acknowledged that a route was used for travel to the bay. Testimony was offered to support the existence of a specific route of travel. One plaintiff testified to his use, referring to the section of land as "the old roadway," and saying that he maintained, in counsel's words, "a straight line to the bay from the end of the improved portion of Hale Road," and that "[t]here was always a road there." There was also testimony that fences bounded the purported road.

We defer to the court's findings of fact regarding the existence of a defined line of travel, which was based on both the trial judge's personal visit to the land in question and testamentary evidence. We cannot say the court clearly erred in its finding regarding the defined line of travel.

The second element of highway by user is the requirement "that the road was used and worked on by public authorities." *Villadsen*, 268 Mich App at 292. The maintenance must be more than "infrequent [and] minor," but the nature of the road must be considered. *Id.* at 295. Where, as here, the road in question is "a quiet country two-track road," the government's maintenance of the road need not be "extensive." *Id.* at 295-296. A court need not limit its examination of the road maintenance to that performed on the disputed portion of the road, but may also consider work done on areas that are not in dispute. *Id.* at 296.

Defendants argue that there was no evidence showing any government maintenance on the portion of road in dispute, and therefore plaintiffs failed to prove this element. That argument ignores the case law and testimony on this issue. Case law allows courts to consider work done on the undisputed portion of the road. See, e.g., *Neal v Gilmore*, 141 Mich 519, 526-527; 104 NW 609 (1905); *Villadsen*, 268 Mich App at 296; *Kalkaska Co Rd Comm v Nolan*, 249 Mich App 399, 402; 643 NW2d 276 (2001). Additionally, evidence presented by plaintiffs demonstrated that the government completed work on the disputed portion of the road.

There was considerable evidence of maintenance of the undisputed portion of the road. Plaintiff's exhibit 11 was a photocopy of a published "Notice of Letting Drain Contract," dated August 31, 1917, which described in detail the requirements of the drain that was to run over the land in dispute. The contract required that the excavations from "the said excavations shall be

leveled down 8 feet wide on each side of the center line of the highway so as to make a smooth and acceptable road bed." Defendants' exhibit 30 was a letter from the manager of the road commission disclaiming jurisdiction over any portion of the road beyond the old oak tree, but the evidence indicated that the turn-around just south of the old oak tree was improved and maintained. The evidence of the actual maintenance of the disputed portion of the road was less extensive. One witness testified that he plowed roads for the county, and was reprimanded by his supervisor after the first time he plowed Hale Road because he plowed snow in such a way as to block access to the path leading to the bay. The witness testified that he was told to, and did, plow Hale Road in such a way that "people could . . . actually use the road." Another witness testified that, when he was Township Supervisor, the township received a grant to improve a road that "had public access to public waters." The witness testified that most of the grant was used to gravel "Hale Road from Stover Road to the water line at that time."

Since there was sufficient evidence on the record to support the trial court's finding of government use and maintenance, the finding was not clearly erroneous.

IV. Acceptance of Highway by User by Governmental Entity

Defendants next claim the trial court erred in failing to determine whether there was an acceptance of the highway by user by an authorized governmental entity. An explicit acceptance of the road is not an element of highway by user; rather, a claimant can show that a governmental unit accepted "at least by taking over control and maintenance of some portion of such road." *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958). In other words, to the extent that governmental acceptance is required, that acceptance can be shown by satisfying the second element of highway by user; it is not a fifth element or separate requirement.

Defendants claim the road in question was not within Arenac Township, but Au Gres Township, and therefore only Au Gres Township or Arenac County Road Commission could "accept" the road as a public highway through use and maintenance. Defendants claim that neither body acted to accept the road and that Arenac Township, which did so act, was not authorized to accept the road.

Defendants' claim fails in two ways: First, there was evidence at trial to show that the road in question was under the jurisdiction of Arenac Township. While the center line of Hale Road is the dividing line between the two townships, the townships agreed in 1916 to divide maintenance of the township line, such that Au Gres Township is responsible for the north half, and Arenac Township is responsible for the south half, including the road in question. Second, there was evidence at trial to show that Arenac County Road Commission had used and maintained Hale Road in such a manner as to constitute implicit acceptance. One witness testified that the township had contracted with the road commission to gravel the road all the way to the waterline. Another witness, as noted, testified that his supervisor, a county employee, instructed him to maintain public access to the unimproved portion of Hale Road. The trial court's findings were supported by evidence and were not clearly erroneous.

V. Conclusion

In reviewing a trial court's findings of fact, we do not substitute our judgment for that of the trial court but examine the findings under a standard of clear error. Here, the trial court's

findings of fact were supported by the evidence and were not clearly erroneous. The court did not clearly err in holding there was a public highway by user over defendants' land.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens